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Public Prosecutor v Yong Ngie Ung

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COURT OF APPEAL (KUCHING) — CRIMINAL APPEAL NO Q-05(LB)-45–01 OF 2016
TENGKU MAIMUN, BADARIAH SAHAMID AND KAMARDIN HASHIM JJCA
27 SEPTEMBER 2016

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Criminal Procedure — Appeal — Appeal against acquittal and discharge — Respondent charged with offences of murder under s 302 of the Penal Code and voluntarily causing hurt under s 324 of the Code — Whether there was error on trial judge's finding of facts — Whether learned trial judge correctly applied his mind to evidence in proper judicial manner — Whether court should interfere with trial judge's finding of facts — Penal Code ss 302 & 324

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The respondent was charged with the offences of murder under s 302 of the Penal Code ('the Code') and voluntarily causing hurt by dangerous weapon or means under s 324 of the Code. The appellant's case was that, the respondent had committed murder of one Hii Teck Luk ('the deceased') and also causing hurt to one Patrick Sia Siew Kieng ('PW17') in a fight occurred in front of a premise known as The Core situated in Sibu, Sarawak. PW17 as the only eyewitness of the incident testified that the respondent was the one who committed the murder of the deceased and at the same time the one who injured him on his waist. In his defence, the respondent testified that the offences were committed by one Ah Tak, who was also his boss. The respondent contended that, he came to the crime scene to stop the fight. At the end of the trial, the learned trial judge had acquitted and discharged the respondent on both the charges, hence this appeal. The four issues raised in the present appeal were: (a) on the non-speaking judgment of the learned trial judge; (b) on the identification parade evidence; (c) on the adverse inference against the appellant by learned trial judge for the non-calling of material witnesses namely, Wendy, Hii Teck Ung and Wong Bing Huat; and (d) the non-appreciation of the defence version with regards to Ah Tak which allegedly an afterthought.

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Held, dismissing the appeal and affirming the order of acquittal and discharge of the respondent by the High Court:

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(1) All the issues canvassed by the appellant were related to findings of facts by the learned trial judge. It is trite that an appellate court will be slow to disturb such findings of fact if such findings are not clearly against the

weight of evidence. Unless such findings are perverse or obviously wrong, the appellate court will not interfere with the findings of fact of the trial court (see para 16).

(2) The learned trial judge had given sound reasons as to why the evidence of PW17 was rejected and the defence version was admitted and accepted. The learned trial judge had also pointed out the shortcomings in the handling of the identification parade. Further, with regards to adverse inference, the court agreed with the learned trial judge that the non-calling of the three witnesses was fatal on the factual matrix of the present case. Lastly, the learned judge had accepted the respondent's explanation and version that he was not the one who attacked PW17 and the deceased as reasonable and probably true. The learned trial judge had correctly applied his mind to the evidence in a proper judicial manner. There was no error in the learned trial judge's findings and there was no reason to interfere with the finding of facts made by him (see paras 20, 22, 24 & 26–27).

[Bahasa Malaysia summary

Responden dituduh dengan kesalahan membunuh di bawah s 302 Kanun Keseksaan ('Kanun') dan dengan sengaja menyebabkan kecederaan dengan senjata berbahaya atau cara di bawah s 324 Kanun. Kes perayu adalah bahawa, responden telah melakukan pembunuhan terhadap seorang yang bernama Hii Teck Luk ('si mati') dan juga menyebabkan kecederaan kepada seorang yang bernama Patrick Sia Siew Kieng ('PW17') dalam pergaduhan yang berlaku di hadapan premis yang dikenali sebagai The Core yang terletak di Sibu, Sarawak. PW17 sebagai satu-satunya saksi kejadian memberi keterangan bahawa responden lah orang yang melakukan pembunuhan terhadap si mati dan pada masa yang sama orang yang mencederakan pinggangnya. Dalam pembelaannya, responden memberi keterangan bahawa kesalahan-kesalahan dilakukan oleh seorang yang bernama Ah Tak, yang mana adalah ketuanya. Responden berhujah bahawa, dia ke tempat kejadian untuk meleraikan pergaduhan tersebut. Pada akhir perbicaraan, hakim perbicaraan yang bijaksana telah membebaskan dan melepaskan responden atas kedua-dua tuduhan, maka rayuan ini. Empat isu yang dibangkitkan adalah: (a) atas alasan-alasan dapatan yang tidak diberikan oleh hakim perbicaraan yang bijaksana; (b) atas keterangan kawad cam; (c) atas inferens bertentangan terhadap perayu oleh hakim perbicaraan yang bijaksana kerana perayu tidak memanggil saksi-saksi material iaitu, Wendy, Hii Teck Ung dan Wong Bing Huat; dan (d) tiada penilaian versi pembelaan berkaitan Ah Tak yang mana didakwa sebagai sesuatu yang difikirkan kemudian.

Diputuskan, menolak rayuan dan mengesahkan perintah pembebasan dan perlepasan responden oleh Mahkamah Tinggi:

(1) Kesemua isu yang dikemukakan oleh perayu adalah berkaitan dapatan

fakta oleh hakim perbicaraan yang bijaksana. Ia adalah nyata bahawa mahkamah rayuan akan perlahan untuk campur tangan kepada dapatan fakta sedemikian jika dapatan fakta sedemikian jelas tidak bertentangan dengan berat keterangan. Kecuali dapatan sedemikian adalah bertentangan atau jelas salah, mahkamah rayuan tidak akan campur tangan dengan dapatan fakta mahkamah perbicaraan (lihat perenggan 16).

(2) Hakim perbicaraan yang bijaksana telah memberikan alasan-alasan yang kukuh mengapa keterangan PW17 ditolak dan versi pembelaan diakui dan diterima. Hakim perbicaraan yang bijaksana juga menunjukkan kelemahan dalam mengendalikan kawad cam. Selanjutnya, berkaitan inferens bertentangan, mahkamah bersetuju dengan hakim perbicaraan yang bijaksana bahawa dengan tidak memanggil ketiga-tiga saksi adalah fatal atas matriks fakta kes ini. Akhirnya, hakim yang bijaksana telah menerima penjelasan dan versi responden yang dia bukan orang yang menyerang PW17 dan si mati sebagai munasabah dan mungkin betul. Hakim perbicaraan yang bijaksana telah secara betul mengarahkan mindanya kepada keterangan dalam cara kehakiman yang betul. Tidak terdapat kesilapan dalam dapatan hakim perbicaraan yang bijaksana dan tidak ada sebab untuk campur tangan dengan dapatan fakta yang dibuat olehnya (lihat perenggan 20, 22, 24 & 26–27).]

Notes

For cases on appeal against acquittal and discharge, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 223–228.

Cases referred to

Andy bin Bagindah v PP [2000] 3 MLJ 644; [2000] 3 CLJ 289, CA (refd)
Kobra Taba Seidali v PP [2014] 2 MLJ 554; [2014] 2 CLJ 12, CA (refd)
Kunalan a/l Kandasamy lwn PP [2014] 3 MLJ 266; [2014] 2 CLJ 25, CA (refd)
Mohd Nazri bin Omar & Ors v PP [2014] 5 MLJ 644; [2014] 1 LNS 576, CA (refd)
Ooi Chee Seong & Anor v PP [2014] 3 MLJ 593, CA (refd)
PP v Mohd Zahari bin Embong [2013] 1 MLJ 201; [2012] 1 LNS 471, CA (refd)
Wan Marzuki bin Wan Abdullah v PP [2008] MLJU 285; [2008] 4 CLJ 631, CA (refd)

Legislation referred to

Criminal Procedure Code s 182A
Evidence Act 1950 s 114(g)
Penal Code ss 302, 324

Appeal from: Criminal Trial No SBW-45–11/8 of 2014 (High Court, Sibu)

Norinna Bahadun (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Augustine Liom (Tang & Co) for the respondent.

Kamardin Hashim JCA:

[1] The respondent was charged and tried at Sibu High Court for an offence of murder and voluntarily causing hurt by dangerous weapon or means under the Penal Code. The charges read as follows:

First Charge:

> Bahawa kamu pada, 31.12.2012, jam lebih kurang 1.00 pagi bertempat di hadapan premis The Core, Lorong 7E, Jalan Pahlawan, Sibu di dalam Daerah Sibu, di dalam Negeri Sarawak, telah melakukan pembunuhan dengan menyebabkan kematian ke atas HII TECK LUK (L) (KPT: 820210-13-5119), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

Second Charge:

> Bahawa kamu pada, 31.12.2012, jam lebih kurang 1.00 pagi bertempat di hadapan premis The Core, Lorong 7E, Jalan Pahlawan, Sibu di dalam Daerah Sibu, di dalam Negeri Sarawak, dengan sengaja telah menyebabkan kecederaan ke atas PATRICK SIA SIEW KIENG (L) (KPT: 901027-13-6337) dengan menggunakan sebilah pisau suatu alat untuk menikam iaitu jika digunakan sebagai senjata untuk melakukan kesalahan yang mungkin menyebabkan kematian dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 324 Kanun Keseksaan.

[2] At the end of the trial, the learned trial judge had acquitted and discharged the respondent on both the charges. Hence the appeal before us.

[3] We heard the appeal on 16 August 2016 whereby we dismissed the appeal. We affirmed the respondent's acquittal on both the charges. We now give our grounds.

CASE FOR THE PROSECUTION

[4] The narratives of the prosecution's case are as follows:

(a) one Patrick Sia Siew Kieng ('PW17'), the victim in the second charge, is the principal and sole eye witness called by the prosecution in this trial. PW17 testified that on the night in question at about 1am on

31 December 2012, the deceased had a quarrel with his girlfriend called Wendy on the street in front of The Core;

(b) at the same time there were two persons across the street, one of them who was later identified as the respondent, thought that the deceased was scolding them when in fact the deceased was scolding his girlfriend. There was some shouting between the deceased and the two persons;

(c) they approached each other and a fight ensued. PW17 had tried to stop the fight but instead PW17 was punched by one of them (not the respondent);

(d) PW17 further testified that he saw the respondent and the deceased were fighting each other. PW17 saw the respondent stabbed the deceased with a cockfighting spur *(taji)* at the chest. The deceased fell down with blood on his clothes;

(e) PW17 also told the court that the respondent moved towards him and attacked him with the spur. PW17 later realised that he was injured at his waist;

(f) both PW17 and the deceased were sent to the hospital. The deceased died at about 5.30am the fateful morning. PW17 was treated for a cut injury he sustained at his abdomen;

(g) the police came looking for the respondent the following night at his house but could not find him. The police searched the respondent's car left at the house and found a spur ('P4') at the driver's headrest;

(h) the police arrested one Wong Bing Huat, suspected to be involved in the case. The police were also looking for a person by the nickname 'Ah Tak' being a suspect, but was unable to locate him; and

(i) the respondent was arrested about one year later after the incident on 4 January 2014 at his house and charged for the two offences as per the charges.

FINDINGS OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION'S CASE

[5] At the end of prosecution's case, the learned trial judge had subjected the prosecution's case to a maximum evaluation and ruled that the prosecution had prove a prima facie case against the respondent on both of the charges as proffered. The learned trial judge had accepted the evidence of the prosecution's witnesses at face value after scrutinising and evaluating the credibility of the main and sole eye witness of the prosecution, namely PW17. The learned trial judge found that the prosecution through the testimony of PW17 even though without any corroboration, had established the ingredients of the offence under s 302 of the Penal Code, namely:

A (a) the deceased Hii Teck Luk had died;

(b) the death of the deceased was caused by the act of the respondent;

(c) in causing the death of the deceased, the respondent had:

B (i) acted with the intention of causing death; or

(ii) acted with the intention of causing such bodily injury that he knew to be likely to cause death; or

(iii) acted with the intention of causing such bodily injury and such C bodily injury was sufficient in the ordinary cause of nature to cause death; and

(iv) did an act which was so imminently dangerous that it must in all probability cause death.

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[6] For the offence of voluntarily causing bodily injury, the learned trial judge was satisfied that the prosecution had proved the two main ingredients of the charge namely, that Patrick Sia Siew Kieng suffered injuries and that the respondent had voluntarily caused such injury to the said person. The E respondent was thus ordered to enter his defence in respect of the said two charges.

[7] We were in total agreement with the findings of the learned trial judge at this stage.

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DEFENCE CASE

[8] The respondent testified on oath and his defence in essence was as follows:

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(a) in the afternoon of 30 December 2012, the respondent was sleeping in his house at No. Lorong 3, Jalan Lim Han Swee, Sibu, Sarawak. He woke up at 5pm something and then he went to his place of work at a workshop at Jalan Ding Lik Kong, Sibu, to pump oil from an oil tanker H into the storage tank at the workshop. His employer or boss was Tang Tiong Chai or nick-named 'Ah Tak';

(b) after he finished his work at about 7pm something, he went home and took a bath. After the respondent took his bath, he received a phone call, I informing him that there was another oil tanker coming. He then went to his place of work again to assist to pump oil from the oil tanker to the storage tank. At his place of work, he met his boss 'Ah Tak'. They were together until about 9.35pm when 'Ah Tak' left the workshop, telling the respondent that he is going out, to drink beer. The respondent stayed

behind to finish his work. Before 'Ah Tak' left, he invited the respondent to join him for a drink at the Bus Terminal area, at a pub opposite another pub called 'The Core';

(c) the respondent stated that he finished his work at almost 10pm, about half an hour after 'Ah Tak' left. The respondent said he received a call from 'Ah Tak' and he left his place of work at about 10.10pm to join 'Ah Tak'. He drove his own car, a black coloured 'Toyota Vios' bearing registration No QSM 9925, to join 'Ah Tak' for drinks;

(d) on reaching the place, he parked his car opposite 'The Core' pub. As he parked his car, he saw 'Ah Tak' and 'Ah Tak's' friend whom he did not know, standing at the back of someone's car. The respondent then came out of his car and just as he was coming out, he heard there was a quarrel whereby dirty words were exchanged and there were shouts in Foochow dialect between 'Ah Tak' and about eight to ten persons who were at the parking lots on the opposite side of the street;

(e) the respondent said that 'Ah Tak' and his friend whom he did not know went over to the group of persons first ie before him. 'Ah Tak' and his friend met the group of persons close to the middle of the road. There was a fight between 'Ah Tak' and his friend with the group of persons who were armed with wooden sticks, iron pipes and iron car wheel removers;

(f) the respondent testified that he saw 'Ah Tak' had a knife when the fighting started and at that material time, the respondent said he was at the road side. The respondent tried to be a middle man to stop the fight and while the fight took place, he shouted he was 'Lao Sang'. He shouted because he thought that maybe someone in the other group may know him and that they might stop fighting. Then one of them in the group who was not armed, approached him, trying to punch him but he avoided the punch with his hand. After he shouted that he was 'Lao Sang', someone from the group, fell down to the ground and they stopped fighting. The friends of the person who had fallen down, took him to a car;

(g) the respondent then got into his car, started his car and put it into the reverse gear. At that point of time, 'Ah Tak' got inside his car and sat next to him, ie next to the driver's seat. 'Ah Tak' asked for tissue paper and it was then he saw 'Ah Tak's' hand was full of blood. 'Ah Tak' was holding a 'T' shaped knife which protruded in between his fingers. 'Ah Tak' then used tissue paper to wipe the blood from his hand. The respondent then asked 'Ah Tak' about the fight and 'Ah Tak' told him the group of persons had scolded him. 'Ah Tak' also told him he had stabbed three persons;

(h) 'Ah Tak' then requested the respondent to send him to where his car was parked which was at the back of the block of building from where his own car was parked. The respondent sent 'Ah Tak' to his car and then he himself drove back home;

(i) the respondent further testified that he did not carry any weapon, knife or any sharp instrument that night. He did not cause injury to anybody, using any knife or sharp instrument. He said it was a lie for PW17 to say he had stabbed the deceased and PW17 at his abdomen. The respondent said it was not true that only after slashing or stabbing PW17, he introduced himself as 'Lao Sang';

(j) after he drove home he then used his mother's car to see a friend 'Ah Sim' who was staying at a hotel at Pedada Road and they talked about the incident. He did not know the whereabouts of 'Ah Sim' as he was wanted by the police for being involved in drug activities. After seeing 'Ah Sim' the respondent went to his girl friend's house at Kampong Hilir, Sibu where he stayed the night. The respondent went home the next morning and his mother informed him the police had come to the house and had taken his car with them; and

(k) after learning from his mother that the police were looking for him, he want to see 'Ah Tak' at the workshop. 'Ah Tak' asked him to leave Sibu temporarily and he left. When he contacted 'Ah Tak', 'Ah Tak' told him he could help him to arrange the matter with the police. He and 'Ah Tak' did not contact each other for four to five months and he did not know the whereabouts of 'Ah Tak'. He did not know Wong Bing Huat and did not know if he was the friend of 'Ah Tak' whom he saw that night.

FINDING OF THE TRIAL JUDGE AT THE END OF THE DEFENCE CASE

[9] The learned trial judge found that the defence had succeeded in casting a reasonable doubt upon the prosecution's case. The learned trial judge re-evaluated the testimony of the prosecution's sole eye witness (PW17) in the light of the defence case and held that the prosecution had failed to prove both the charges against the respondent beyond reasonable doubt. The learned trial judge therefore acquitted and discharged the respondent on both the charges as proffered.

THE APPEAL

[10] Before us, the learned deputy public prosecutor submissions were anchored upon the broad ground that the learned trial judge had erred in law and in fact when His Lordship found that the prosecution had failed to prove its case against the respondent beyond reasonable doubt and thereafter

acquitted and discharged the respondent on both the charges. The learned deputy raised four issues in her submission to support her contentions. The four issues raised were:

(a) the non-speaking judgment of the learned trial judge;

(b) the identification parade evidence;

(c) adverse inference at the end of defence case; and

(d) non-appreciation of the defence version.

[11] In respect of the first ground, the learned deputy submitted that the grounds of judgment of the learned trial judge which merely stated that a prima facie case had been proven without more can be categorised as a non-speaking judgment.

[12] In respect of the identification parade, the learned deputy submitted that there was no infirmity in the identification parade conducted by the police in which PW17 had positively identified the respondent who stabbed the deceased with the *'taji'*. It was submitted that the finding made by the learned trial judge that the identification parade cannot be relied on as the witnesses might have had a chance to see the respondent before the identification parade, was wrong and dangerous. There was no clear evidence that PW17 had seen the respondent prior to the identification parade being conducted.

[13] The learned deputy also submitted that the learned trial judge erred in law and in fact when His Lordship drew an adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution for the non-calling of Wendy, Hii Teck Ung and Wong Bing Huat, even though they were offered and made available to the defence.

[14] The learned deputy further submitted that the learned trial judge had failed to properly appraised two important facts which worked against the respondent. The two factors referred by the learned deputy were that there was no explanation why the respondent ran away and that a *'taji'* was recovered from the respondent's car.

[15] The learned deputy concluded that the defence of the respondent in putting the blame on 'Ah Tak' was a mere afterthought and bare denials without more. The learned deputy submitted that there were serious errors of facts found by the learned trial judge and urged for an appellate intervention.

A OUR DECISION

[16] After hearing submissions and perusal of the appeal records including the grounds of judgment, we found that all the issues canvassed by the learned deputy for and on behalf of the appellant were related to findings of facts by the B learned trial judge. It is trite that an appellate court will be slow to disturb such findings of fact if such findings are not clearly against the weight of evidence. Unless such findings are perverse or obviously wrong, the appellate court will not interfere with the findings of fact of the trial court (*Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644; [2000] 3 CLJ 289; *Wan Marzuki bin Wan Abdullah v Public Prosecutor* [2008] MLJU 285; [2008] 4 CLJ 631; *Public Prosecutor v Mohd Zahari bin Embong* [2013] 1 MLJ 201; [2012] 1 LNS 471).

D **[17]** The prosecution's case was solely premised on PW17's evidence. The very essence of the respondent's defence was that it was not him but Ah Tak and Ah Tak's friend who had fought with the deceased. The respondent's version was that Ah Tak who was armed with a cock fighting spur which the respondent saw on that fateful night. The respondent also said that Ah Tak had told him E that he had stabbed three persons and that Ah Tak's hand was full of blood when he entered the respondent's car. The respondent alleged that he only came to the scene when the fight between the two groups had already started and the respondent's action then was to break up the fight.

F **[18]** We found that the defence versions had been put to PW17 when he was cross-examined by the learned defence counsel. The evidence presented by PW17 had been challenged by the defence counsel materially, especially on the real identity of the assailant. From the crossexamination, the learned trial judge when re-evaluating PW17's testimony, found that there were some flaws and G inconsistencies in the evidence of PW17. The findings of the learned trial judge can be seen at pp 18–23 of AR Vol 1 which were produce inextenso as below:

> 27. In his testimony, PW17 testified that Accused fought with the deceased which resulted in the deceased falling down to the ground. Then after that the Accused H turned to him with a spur and he evaded the punch but suffered a stab or slash wound at his waist. However in the Prosecution's opening statement marked as 'E', it described the incident differently from PW17's testimony. The Prosecution's Opening Statement stated that it was when PW17 tried to pull the Accused while the accused was fighting the deceased that he [PW17] got stabbed at his abdomen.
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> I 28. The Investigating Officer, PW20 at Q&A 1093 of NOP, confirmed that PW17 had said this in the statement. PW17 himself admitted in Q&A 879 and Q&A 800 of NOP that he had said so in his statement to the police i.e. it was when he pulled the Accused that he got stabbed.

29. Further, it is noted that in the cross examination of the Accused, the learned DPP put to the Accused that PW17 tried to pull the accused, to stop him, from stabbing the deceased that he himself got stabbed.

30. This Court thus finds that this is a major inconsistency and further indicated that PW17's testimony is not truthful and/or that his testimony cannot be relied upon when he implicated the Accused who was in court and not someone else i.e. Ah Tak who had absconded.

31. Further PW17's testimony is also that two persons came to approach them. One of them was a tall person who was unknown [Q&A 721 of NOP] and who punched him at his waist [Q&A 717 of NOP]. The other person is the Accused or 'Lao San' who was alleged to have fought with the deceased [see Q&A 726 of NOP]. So the alleged two persons were the Accused and a tall person, most likely 'Ah Tak' who was tall.

32. In cross-examination at Q&A No. 827 of NOP, it was suggested to PW17 that the two persons were Ah Tak and Wong Bing Huat i.e. not the Accused and PW17's answer was 'I only know Wong Bing Huat'. Here PW17 stated that Wong Bing Huat was one of the two persons and Wong Bing Huat was a person that he knew. But in later cross-examination at Q&A No. 850 of NOP, it was put to him as follows:

> Q849: I put to you that the first two persons who were approaching Hii Teck Luk did not consist of the accused but two others that is 'Ah Tak' and Wong Bing Huat?
>
> Answer: I disagree.

33. PW17 was then asked to clarify on this, in re-examination as follows:

> Q966: Referring to Q849, can you explain why you disagree?
>
> Answer: It was because it was the Accused and Wong Bing Huat who had approached Hii Teck Luk and not Ah Tak.

34. So here, PW17 was so sure it was the Accused and Wong Bing Huat whom he knew who had approached them.

35. In PW17's testimony, he said the two persons were the Accused and unknown tall person [Ah Tak]. Since PW17 knew Wong Bing Huat, it would reasonable to expect PW17 to say it was Wong Bing Huat and not the unknown person.

36. This Court finds that this is a crucial inconsistency is on a vital matter in this case as PW17 testified that it was firstly the Accused and an unknown tall person. Then he said it was the Accused and Wong Bing Huat. He seemed uncertain and contradicted himself as who were the two persons, whether it was the Accused with the unknown person [Ah Tak] or were they, the Accused and Wong Bing Huat, whom he knew. This is important because the Accused's testimony was that it was Ah Tak who was tall and Ah Tak's friend who was unknown to him who were fighting with the group of persons and not himself.

37. So since PW17's evidence on a material issue, is inconsistent and wavering as who were the two persons, it appears highly probable that the two persons were Ah Tak and Wong Bing Huat and not the Accused. This Court finds that there is a

reasonable doubt in PW17's testimony whether it was the Accused together with another person who had approached PW17 and his friends.

38. This Court finds that the Accused's story that it was Ah Tak and his friend who had fought with PW17, the deceased and his friends and not him, to be highly probably and reasonably credible. On the balance of probabilities and in the final analysis, this Court finds that it could not have been the Accused at all who was one of the two persons who had stabbed the deceased and injured PW17.

39. Furthermore, from the testimony of the Investigation Officer, PW20, both Ah Tak and Wong Bing Huat were indeed involved in the fight:

Q1129: In the case who gave you the name' Ah Tak'?

Answer: Based on information from the public.

Q1130: Based on information Ah Tak was involved in the fight, is that correct?

Answer: He may be involved in the fight.

Q1133: Then who gave you the name Wong Bing Huat?

Answer: After the incident, we have shown all the photographs that we have to witnesses in the case. One of them who was believed involved in the fight was Wong Bing Huat or 'Ah Hua'.

Q1136: According to your information, he was indeed at the scene of the fight is that correct?

Answer: Yes.

40. So if indeed Ah Tak and Wong Bing Huat were both involved according to information received, then they would be the two persons who had fought with PW17, the deceased and their friends. The Accused's testimony that he came later, did not join the fight and tried to break up the fight is credible and consistent. The Investigating Officer, PW20 confirmed that Ah Tak and Wong Bing Huat were involved. If they were indeed the ones involved, then the Accused was not involved because according to the Prosecution's case, there were only two persons involved and not three persons as testified by PW17.

41. This Court also finds that since PW17 is a friend of the deceased, there is real likelihood that he has a compelling inclination to tailor his testimony, to get someone whom the police have arrested, to be responsible for his friend's death and his own injury.

42. In so far as PW17's identification of the Accused is concerned and given the situation where a sudden fight erupted and there was fighting between 2 groups of people which resulted in confusion, this Court finds that either PW17 has been mistaken as to the person who had inflicted the fatal injury i.e. mistook the Accused who indeed was there at the scene but who came slightly later than Ah Tak or PW17 could have conveniently implicated the Accused because the real culprit that is Ah Tak could not be traced, arrested and charged.

43. This Court finds that there is a real danger of convicting the wrong person, in the circumstances of this case. The Accused's testimony on the other hand must not be summarily dismissed as untrue. It is capable of throwing a reasonable doubt on

PW17's story and it is a probable and reasonably credible story. A reasonable doubt exists as to whether the Accused had inflicted the fatal injury. The Accused's evidence was that he saw Ah Tak with a knife and his hand was covered with blood could probably be true. The pathologist, PW1 testified that the weapon as sketched by the Accused marked as Exhibit 'D1' which was seen in the hand of 'Ah Tak' by the Accused, could also cause the fatal injury to the deceased.

44. The Accused's defence is further substantiated by the fact that Wong Bing Huat was actually arrested and the police are still looking for 'Ah Tak' i.e. he remains a suspect in the murder which is subject matter of this case. Until today the said Ah Tak still cannot be traced by the police. There is real likelihood that he was the one who inflicted the fatal injury on the deceased and the hurt injury to PW17 and this creates a doubt whether the Accused was involved at all.

[19] It is the bounden duty of the trial judge to consider and scrutinise all the evidence adduced by the respondent in the light of the prosecution's version. In undertaking that duty, the learned trial judge was obliged to consider all the evidence before him and to decide whether the prosecution has proved its case beyond reasonable doubt under s 182A of the Criminal Procedure Code.

[20] In the instant appeal we found that the learned trial judge had considered and subjected all the evidence adduced by the prosecution to a critical re-examination at the end of the defence case and found that the prosecution case was not proven beyond reasonable doubt. A perusal of His Lordship's judgment shows that the learned trial judge had given sound reasons as to why the evidence of PW17 was rejected and the defence version was admitted and accepted. We did not find the trial judge had erred in his finding. Certainly, we did not agree with the learned deputy on her complaint against the grounds of judgment of the learned trial judge.

[21] In respect of the second ground of appeal, the evidence of the identification parade, the learned trial judge had discussed this issue in his grounds at pp 24–26 of the AR Vol 1. The learned trial judge held that the identification parade evidence was not reliable thus the real identity of the person who attacked PW17 and the deceased became questionable and doubtful.

[22] In rejecting the evidence of the identification parade, the learned trial judge pointed out the shortcomings in the handling of the identification parade. From the appeal records, there were altogether five witnesses who were called to identify the respondent in the identification parade. Only PW17 could identify the respondent whereas the other four witnesses could not identify the respondent even though all four were present at the scene of the incident. On the identification by PW17, the learned trial judge found that the evidence given by the police officer conducting the identification parade, Inspector Mohd Fazirul bin Mohd Fisol ('PW11') who testified that PW17 had

not identified the respondent as the person who was merely present at the scene of the incident or the one who had caused hurt to him or who had stabbed the deceased with the 'taji'. In this respect, the learned trial judge found that there was a gap in the prosecution's case with regard to the identity of the person who inflicted injuries to PW17 and to the deceased.

[23] Besides, there was a possibility that PW17 might have had a chance to see the respondent before the identification parade based on the evidence given by PW11 and PW17. The learned trial judge also stated at p 25 AR Vol 1, other shortcomings which vitiated the evidence of the identification parade, as follows:

> 48. It is pertinent to note that the defence never disputed that the Accused was one of the persons present at the scene of the incident that night and that he was somewhat involved in the fight. It is further noted that the 1*st* witness and 2*nd* witness at the Identification Parade stated the suspect [the Accused] was not in the parade. Thus it contradicted PW17's testimony that the Accused was the suspect.
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> 49. PW11 admitted that he never informed the Accused of the result of the Identification Parade [Q&A 488 of NOP]. Four other persons who were called to identify the Accused in the Identification Parade did not or could not identified the Accused. This created a doubt as to whether the Accused was the real suspect because the 4 witnesses who were at the scene did not or could not identify him.
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> 50. PW11 also admitted in Q&A 490 of NOP that he did not inform the Accused of his right, to object to all or any of the participants. Thus the Accused was deprived of his right to object to the participants which is a right prescribed by the Inspector General Standing Orders (IGSO).

[24] Now we come to the third ground of appeal canvassed by the learned deputy regarding adverse inference for non-calling of material witnesses. The learned trial judge had invoked adverse inference against the prosecution for failure to call three material witnesses who were present and witnessed the incident. They were Wendy, Hii Teck Ung and Wong Bing Huat. While the first two were offered to the defence, the latter was not called and not even offered to the defence. Based on the facts of this case, all of them were at the scene of the fight at the material time and had knowledge of what had actually happened but they were not called to testify. The trial judge was of the view that by mere offering two of them were not sufficient to discharge the prosecution's burden of proving its case beyond reasonable doubt, especially when there was a doubt as to the real identity of the assailant. It was our view that the trial judge was right in his finding. Not only because there was an issue on identity but also coupled with material inconsistencies in the evidence of the sole eye witness ('PW17'). In consequence, we agreed with the learned trial judge that the non-calling of the three witnesses was fatal on the factual matrix of the instant case which resulted in an opportunity of fair trial being compromised by the prosecution (see *Kobra Taba Seidali v Public Prosecutor* [2014] 2 MLJ 554;

[2014] 2 CLJ 12; *Mohd Nazri bin Omar & Ors v Public Prosecutor* [2014] 5 MLJ 644; [2014] 1 LNS 576; *Ooi Chee Seong & Anor v Public Prosecutor* [2014] 3 MLJ 593 and *Kunalan a/l Kandasamy lwn Pendakwa Raya* [2014] 3 MLJ 266; [2014] 2 CLJ 25).

[25] The final ground of appeal argued before us by the learned deputy was on the failure of the learned trial judge to appreciate the defence version based on two important facts regarding the respondent's flight after the incident and the recovery of a cock fighting spur in the respondent's car.

[26] The respondent's defence was that he was not the one who attacked PW17 and the deceased with the 'taji'. The respondent stated that he had left Sibu after the incident at the request of 'Ah Tak' but he surrendered to the police after being informed by his mother that the police was looking for him. As regards to the cock fighting spur, the respondent's explanation was that it belonged to his friend Peter who had left it in the respondent's car. The learned trial judge had accepted the respondent's explanation and version as reasonable and probably true. In the mind of the learned trial judge it was sufficient to cast a reasonable doubt on the prosecution's case. At p 30 AR Vol 1, the learned trial judge concluded:

> 62. This court finds that there is nothing to show that the accused's defence is untrue and that it is a reasonably credible defence. His defence has casted a reasonable doubt as to who had actually inflicted the fatal injury on the deceased and the injury to PW17. The accused's story is consistent throughout and is confirmed by the investigating officer, PW20 who stated that the accused had told exact same story to the police immediately after his arrest (see Q&A 1108 to 1113 of NOP).
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> 63. In the light of this court's above findings, this court finds that the accused has successfully casted a reasonable doubt on the prosecution's case in respect of the said two charges preferred against him. In the premises this court discharges and acquits the accused of the said two charges preferred against him.

CONCLUSION

[27] We found that the learned trial judge had correctly applied his mind to the evidence in a proper and judicial manner. We found no error in the trial judge's findings and conclusions and we saw no plausible reason to interfere with the findings of facts made by the learned trial judge.

[28] On that note, we unanimously dismissed the appeal. The order of acquittal and discharge of the respondent by the High Court, was affirmed.

A *Appeal dismissed and order of acquittal and discharge of respondent by High Court affirmed.*

Reported by Dzulqarnain Ab Fatar

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